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JOSEPH F. SPANIOL, JR.
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NO. 86-520

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

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GARY TERRELL,

Petitioner

V.

UNIVERSITY OF TEXAS SYSTEM POLICE, ET AL,

Respondents

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the Fifth Circuit erred in affirming the trial court's taking nothing judgment.

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STATEMENT OF THE CASE

Petitioner was a peace officer employed by the University of Texas System Police at Houston, Texas. In late 1980, Charlie Price, Chief of the University of Texas System Police at Houston, received an anonymous complaint which complained among other things of uneven discipline by Petitioner of his subordinates. This complaint resulted in an internal investigation. As the result of the investigation Petitioner was relieved of his responsibilities as a captain and reassigned to other duties. Later, on June 9, 1981, Chief Price received an anonymous letter containing photocopies of pages from a small notepad in Petitioner's handwriting. Chief Price asked Petitioner whether he had been keeping files on Chief Price. Petitioner denied keeping files. After stating to Petitioner that he could not trust him, Chief Price asked for Petitioner's resignation, and, when Petitioner refused to resign Chief Price fired him. A few days after his termination, Petitioner refused an

offered due process hearing stating "that that wouldn't be necessary; that he wasn't interested in our kangaroo courts . . . and that he would see us in court, a real court."

Petitioner filed suit against the University of Texas System Police and Chief Price in his official capacity. The trial court dismissed these claims as barred by the Eleventh Amendment. Petitioner's amended complaint against Chief Price and Frank Cornwall individually was heard before a jury in May of 1984. The jury was instructed that Petitioner's criticisms of Chief Price concerning (1) Chief Price's policy of mandatory overtime; (2) the need for supervisory training; and, (3) the need to conduct exit interviews to determine why good officers were leaving, were matters of public concern protected by the First Amendment.

The jury then answered special interrogatories for defendants on all issues except those involving Petitioner's First Amendment claims. On the basis of these findings (among which was that Petitioner had suffered no damages) the court entered its judgment that Petitioner take nothing.

Petitioner asserts on Petition for Writ of Certiorari that the Court of Appeals for the Fifth Circuit erred in affirming the trial court's judgment that Petitioner take nothing, and that he was at least entitled to declaratory or injunctive relief on the basis of his First Amendment claims.

SUMMARY OF ARGUMENT

The Court of Appeals did not err in affirming the trial Court's take nothing judgment. The Court of Appeals may affirm upon any basis reflected in the record. The Court of Appeals found that the three criticisms of Chief Price were not matters of public concern.

ARGUMENT

Petitioner asserts that ". . . the District Court determined that Terrell had spoken on three specific issues of 'public concern' which were asserted by Terrell to be the reason for his discharge. These issues included Chief Price's policy of man-

datory overtime, the need for supervisory training, and a need to conduct exit interviews with resigning officers to determine their reasons for leaving." (Petition for Writ of Certiorari, p.4) The district court's determination concerning whether or not speech was on a matter of public concern was properly a legal determination. *Connick v. Meyers,* 461 U.S. 138, 148 n.7 (1983). The trial court initially instructed the jury that the three matters of concern expressed by Petitioner were matters of public concern. (Petition for Writ of Certiorari, A-14). It is unclear whether the trial court ultimately withdrew this purely legal question from the jury in ruling that Plaintiff take nothing. The Court of Appeals for the Fifth Circuit, exercising its *plenary* review of this legal determination, and after reviewing the record as a whole, found that the three matters "expressed" in the context of the present case are *not* matters of public concern. On the basis of this finding, the Court of Appeals affirmed the trial court's denial of relief.

There is no particularly novel position of law advanced in the Appellate Court's affirmance of the trial court upon *any* basis which appears on the record to support the trial court's Judgment that plaintiff take nothing. (Trial Court Judgment, Petition for Certiorari, A-9-10). *Brown v. Allen,* 344 U.S. 443, 459 (1963); *Helvering v. Gowan,* 302 U.S. 238 (1937); *DeSanchez v. Banco Central DeNicaragua,* 770 F.2d 1385, 1387 (5th Cir. 1985); *Clayton v. Orleans Parish School Bd,* 649 F.2d 1084, 1094, n.12 (5th Cir. 1981); *Devine v. Commissioner of Internal Revenue,* 558 F.2d 807 (5th Cir. 1977).

The holding by the Court of Appeals in the present case, that "speech" directed at (1) Chief Price's policy of mandatory overtime (2) the need for supervisory training and (3) the need to conduct exit interviews to determine why good officers were leaving was not on a matter of public concern, is not in conflict with this court's ruling in *Connick v. Meyers,* supra. The matters involved in *Connick* concerned (1) office transfer policy, (2) office morale, (3) the need for a grievance committee, (4) the level of confidence in supervisors, and (5) whether employees felt pressured to work in political campaigns. 461 U.S. at 142. All but the latter [No.5] were deemed to be matters *not* of public concern. The first four survey questions dealt with in *Connick* do not differ significantly from the three matters presented in

the present case. All deal with matters complained of by Petitioner as an employee concerning employment.

Although an argument could be made that each concern could be *stretched* into a matter of public concern, this court in *Connick* chose not to do so and ruled that no First Amendment issue was presented by the first four survey questions. A similar conclusion was reached by the Court of Appeals in the present case. Respondents assert that the Court of Appeals was correct in finding that the three matters "expressed" in the present case were not of "public concern," and that the Court of Appeals was correct in affirming the trial court's judgment that Plaintiff take nothing.

PRAYER

Respondents pray that Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, return receipt requested, as of the 23 day of December, 1986, to:

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JOSEPH W. BARBISCH, JR.